Supreme Court, U.S.
FILED
NOV 11 1980
MICHAEL RODAK, JR., CLERK

80-1073

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSEPH N. MARCAL, III,

Appellant,

vs.

STATE OF LOUISIANA,

Appellee.

On Appeal from the Supreme Court of
The State of Louisiana

JURISDICTIONAL STATEMENT

F. IRVIN DYMOND
DYMOND, CRULL & CASTAING
1220 N. B. C. Building
New Orleans, LA 70112
Telephone: 504/581-7700

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether Article 5, Section 5(C) of the Louisiana Constitution of 1974, which provides that the appellate jurisdiction of the Supreme Court of Louisiana is limited to questions of law, may be applied to bar review of the sufficiency of the evidence under the standard announced by this Court in Jackson v. Virginia, 443 U.S. 307 (1979), viz., "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," without violating the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Whether the evidence presented at the trial of this case was sufficient for any rational trier of fact to have

found the essential elements of the crime beyond a reasonable doubt when the defendant was charged with two counts of public bribery of the same employee, once by check and once in cash, the witnesses to the alleged cash transaction were the same as the witnesses to the alleged check transaction, and bank records refute the alleged check transaction?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

TABLE OF AUTHORITIES CITED iv

JURISDICTIONAL STATEMENT 1

OPINIONS BELOW 3

GROUNDS ON WHICH APPELLATE JURISDICTION OF THIS COURT INVOKED 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 10

STATEMENT OF THE CASE 11

REASONS WHY FEDERAL QUESTIONS ARE SUBSTANTIAL 18

CONCLUSION 27

CERTIFICATE OF SERVICE 29

APPENDIX A -- Opinion of Court Below, January 28, 1980 A-1

Concurring Opinion, DENNIS, J. A-7

APPENDIX B -- Opinion on Rehearing A-9

APPENDIX C -- Notice of Appeal A-14

TABLE OF AUTHORITIES CITED

CASES:

Jackson v. Virginia, 443 U.S. 307 (1979) 6, 7, 8, 17, 18, 20, 21, 23

Neison v. Lagow, 12 How. (53 U.S.) 98 (1851) 9

Pilon v. Bordenkircher, 444 U.S. 1 (1979) 18, 20

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 9

Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964) 22

Thompson v. City of Louisville, 362 U.S. 199 (1960) 19, 20

Winship, In re, 397 U.S. 358 (1970) 19

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

UNITED STATES CONSTITUTION:

Art. VI, cl. 2, U.S. Const. 22, 23

5th Amendment, U.S. Const. 20

14th Amendment, U.S. Const. 10, 17

UNITED STATES CODE:

28 U.S.C. 1257(2) 5, 10

LOUISIANA CONSTITUTION OF 1974:

Art. 5, Sec. 5(C), La.Const. 1974
5, 6, 7, 8, 9, 11, 18, 21, 22, 23

LOUISIANA CONSTITUTION OF 1921

Art. 7, Sec. 10, La. Const. 1921 21

LOUISIANA REVISED STATUTES OF 1951

La.R.S. 14:118 4, 11, 12

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSEPH N. MARCAL, III,

Appellant,

vs.

STATE OF LOUISIANA,

Appellee.

On Appeal from the Supreme Court of
The State of Louisiana

JURISDICTIONAL STATEMENT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Joseph N. Marcal, III, appearing herein through his undersigned counsel, respectfully submits that this case is properly an appeal from the Supreme Court of Louisiana and not a matter invoking the discretionary remedy available on application for a writ of certiorari. In the alternative only, appellant prays these pleadings be treated as an application for a writ of certiorari and that this Court exercise its discretion to review the substantial questions of Constitutional Law presented by this case and to reverse the unjust determination by the Courts of the State of Louisiana that the appellant is guilty of the crime of public bribery. In support of this Court's jurisdiction, appellate or by writ of certiorari, appellant respect-

fully shows:

OPINIONS BELOW

The Opinion of the Louisiana Supreme Court which was originally rendered in this case on January 28, 1980, as yet unreported, is reproduced herein at Appendix A, p. A-1, post.

The Opinion of the Louisiana Supreme Court on Rehearing of this appeal, rendered in these proceedings on June 23, 1980, also unreported at this time, is reproduced herein at Appendix B, p. A-9, post.

There were no relevant written opinions of the Trial Court in this matter.

GROUNDS ON WHICH THE APPELLATE JURISDICTION OF THIS COURT IS INVOKED

This is an appeal from a judgment of conviction in a criminal case arising in

the Criminal District Court for the Parish of Orleans, State of Louisiana. Appellant, an attorney, was convicted of two counts of committing public bribery, in violation of La.R.S. 14:118, following a trial to a judge sitting without a jury. Appellant waived trial by jury.

The original opinion of the Supreme Court of Louisiana was rendered on January 28, 1980. Appendix A, p. A-1, post.

The Louisiana Supreme Court thereafter granted rehearing of this appeal and on June 23, 1980, it again affirmed appellant's conviction and reinstated its original opinion. Appendix B, p. A-9, post.

The notice of appeal from the judgment and opinions of the Supreme Court of Louisiana was timely filed in the Louis-

iana Supreme Court on September 19, 1980, and is reproduced herein at Appendix C, p. A-14, post.

The mandate of the Louisiana Supreme Court was recalled and stayed after the appellant's conviction was reaffirmed on rehearing pending the timely filing of this Jurisdictional Statement on Appeal. That stay has since expired and a rule nisi is pending, ordering appellant to show cause why the judgment of the trial court should not be made executory.

The statute conferring appellate jurisdiction on this Court to review the judgment below is 28 U.S.C. 1257(2).

Appellant raised the issue of the unconstitutionality of Article 5, Section 5(C) of the Louisiana Constitution of 1974, after the Supreme Court of Louisi-

ana refused to review the sufficiency of the evidence on direct appeal in accordance with the standards of this Court's holding in Jackson v. Virginia, 443 U.S. 307 (1979). The Louisiana Supreme Court did not cite the said State Constitutional provision as authority for its refusal to review the sufficiency of the evidence on the constitutional standards imposed by this Court but it did state that its jurisdiction is "limited to questions of law; therefore, if there is some evidence proving the essential elements of the crime, no question of law is presented, sufficiency of the evidence being a matter to be decided by the trier of fact." Appendix A, p. A-4, post. That constitutes a direct application of Article 5, Section 5(C), Louisiana Con-

stitution of 1974 in violation of Jackson v. Virginia, supra.

On rehearing, notwithstanding that appellant had raised the issue of the unconstitutionality of Art. 5, Sec. 5(C), La. Const. 1974, if it is used as a basis to bar the type of review constitutionally mandated under Jackson v. Virginia, supra, the Court did not expressly deal with that issue. Instead, it merely said "Our original opinion is reinstated, and the conviction and sentence of the defendant are affirmed." Appendix B, p. A-13, post.

The fact that the Louisiana Supreme Court did not expressly cite Article 5, Section 5(C), of the State Constitution, although it did expressly apply its provisions which limit the jurisdiction of

that Court to questions of law alone, does not prevent review by this Court of the Federal Constitutional question raised on rehearing by the appellant. The Court necessarily reached the merits of the question, whether it discussed it or not in the opinion, by affirming the judgment without applying the constitutional standards for appellate review of the sufficiency of the evidence when the constitutional standard was pointed out to Court below and it was urged that, if Artcle 5, Section 5(C) of the State Constitution was construed to be a bar to rew of the sufficiency of the evidence to meet the minimal constitutional standard enunciated in Jackson v. Virginia, supra, the State constitutional provision would violate Federal constitutional due pro-

cess. In such cases where the Court below has ignored an attack upon the constitutionality of a statute the constitutionality of which must be upheld in order to reach the decision made by the lower court, this Court has held that it has jurisdiction on appeal. Radio Station WOW v. Johnson, 326 U.S. 120, 129 (1945); Neilson v. Lagow, 12 How. (53 U.S.) 98, 109-111 (1851). The holding that Article 5, Section 5(C) is constitutional is implicit in the judgment affirming the conviction without application of the standard under Jackson, which is contrary to that of the State constitutional provision.

Since the constitutionality of Article 5, Section 5(C), Louisiana Constitution of 1974, was attacked in the Court

below, it cannot be said that the application of that State constitutional standard constitutes an "independent and adequate non-federal ground of decision." The constitutionality of the State provision barring the type of review mandated by this Court in Jackson v. Virginia is a federal question of great substance.

Clearly, this Court has jurisdiction of this case under its appellate jurisdiction. 28 U.S.C. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, in its Due Process Clause, provides:

> nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *.

Article 5, Section 5(C), Louisiana Constitution of 1974, relative to the scope of review in criminal cases by the Supreme Court of Louisiana, provides in relevant part:

> * * * In criminal matters, its (the Louisiana Supreme Court's) appellate jurisdiction extends only to questions of law.

Title 14, Section 118(1), Louisiana Revised Statutes of 1950, provides:

> Public bribery is the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any of the following persons, with the intent to influence his conduct in relation to his position, employment or duty:
>
> (1) Public officer or public employee; * * *.

STATEMENT OF THE CASE

Appellant, an attorney, was convicted after a bench trial of two counts of public bribery in violation of La.R.S.

14:118(1). He was sentenced to one year at hard labor on each count, the sentences to run concurrently.

The first count of the indictment alleged that on or about March 20, 1975, appellant paid Mrs. Dorothy Boyd, a Deputy Clerk of the Criminal District Court for the Parish of Orleans, two hundred dollars ($200.00) in cash to assign one of his cases to a particular section of the said court. The second count alleged that an identical offense occurred on May 16, 1975, and that appellant gave Mrs. Boyd a check for the same amount on that occasion.

Mrs. Boyd testified, under a grant of immunity, that she had assigned the cases as Mr. Marcal requested and that he paid her in the manner alleged in the

indictment. She described the check she allegedly received with regard to the second count of the indictment in a manner which coincided with the appearance of appellant's checks for his "Attorney at Law" account. Her testimony was corroborated by appellant's former legal secretary, Susan Beatty, and a lawyer who had formerly leased office space in appellant's building.

Appellant's former secretary, Susan Beatty, testified that on the day of the alleged cash transaction with Mrs. Boyd, appellant had taken two hundred dollars from his law office. She claimed that appellant later claimed he had used the money to bribe Mrs. Boyd. Mrs. Beatty testified that on May 16, 1975, apellant asked her to stay late to give Mrs. Boyd

an envelope. Mrs. Beatty testified that she opened the envelope to see if it contained anything she should not leave in the window of the office in order to determine whether it was necessary for her to actually wait and give the envelope to Mrs. Boyd. When she opened the envelope, she saw a two hundred dollar ($200.00) check drawn on appellant's "Attorney at Law" account and made payable to Dorothy Boyd. She further testified that she gave the envelope to Mrs. Boyd when Mrs. Boyd came to the office near 5:00 o'clock P.M. on May 16, 1975.

Appellant's former lessor, an attorney named Henry Mitchell, testified that appellant often boasted that he could have cases assigned to a particular section of the Criminal District Court.

He also testified that he witnessed the May 16th transfer of the check to Dorothy Boyd by Mrs. Beatty.

In his defense, appellant testified that the alleged bribery transactions never occurred. He produced all of his checks and bank statements for the period immediately preceding the alleged check transaction and for a substantial period thereafter. All checks were accountable and none of them were written to Mrs. Boyd. While the State had served a subpoena on the bank at which appellant maintained all of his checking accounts and it served another subpoena at the bank at which Dorothy Boyd claimed she had cashed appellant's check which had allegedly been given to her by Mrs. Beatty, there was no check found to sup-

port the alleged transaction. Mrs. Boyd testified that the check had not been returned to her unpaid by appellant's bank. There was no such transaction reflected on appellant's bank statement for the relevant period or any subsequent statement, several of which were offered to disprove that the check transaction occurred and thereby to also show that Dorothy Boyd was lying about the alleged cash transaction.

After the Trial Court entered its judgment in these proceedings, appellant filed a motion for a new trial on the ground that the verdict or judgment did not conform to the law and evidence, viz., the evidence was insufficient to establish appellant's guilt beyond a reasonable doubt of either of the trans-

actions because the check transaction was thoroughly disproved by documentary evidence which was irrefutable and because, the witnesses having thus been shown to have been incredible, no rational trier of fact could have reasonably placed any confidence in the testimony from those same sources to determine the appellant's guilt on the cash transaction. The Trial Court, without any written or verbal opinion stating the reasons it found appellant to be guilty of the charges made, denied the motion for a new trial. The Louisiana Supreme Court rejected appellant's contention that the Due Process Clause, as construed in Jackson v. Virginia, supra, required it to assess the evidence under the standard of appellate review enunciated in Jackson and

held that the jurisprudence under Article 5, Section 5(C), La. Const. 1974, limited its jurisdiction on appellate review to the determination whether there was "some" evidence on each essential element of the alleged offenses, a different form of the "no evidence" test condemned by this Court in Jackson v. Virginia, supra; Pilon v. Bordenkirscher, 444 U.S. 1, 100 S.Ct. 7, 8 (1979). The Court below disregarded appellant's challenge to the constitutionality in view of Jackson's mandate of Article 5, Section 5(C), La. Const. 1974, and refused to review this case under the proper constitutional standard.

REASONS WHY FEDERAL QUESTIONS ARE SUBSTANTIAL

In Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 2789 (1979), this

Court held that the "no evidence" test of Thompson v. City of Louisville, 362 U.S. 199 (1960), was constitutionally inadequate to assure compliance with the reasonable doubt standard of guilt which is required by due process under this Court's decision in In re Winship, 397 U.S. 358, 364 (1970). The Louisiana Supreme Court in this case declined to review appellant's assignment of error that the evidence is insufficient to sustain the verdict of the trial court because that "Court's jurisdiction is limited to questions of law; therefore, if there is some evidence proving the essential elements of the crime, no question of law is presented, sufficiency of the evidence being a matter to be decided by the trier of fact. It follows

that on review of a denial of a motion for a new trial, this Court will not review the sufficiency of the evidence presented to the trial court but will simply determine if there is some evidence of each element." This is a mere formulation of the "no evidence" test. In Pilon v. Bordenkircher, 444 U.S. 1, 100 S.Ct. 7, 8 (1979), applying Jackson v. Virginia, supra, retroactively, this Court repeated the holding of Jackson "that the Thompson 'no evidence" test is constitutionally inadequate in a case such as this."

The proper standard for appellate review, under the Fifth or Fourteenth Amendment Due Process Clauses, is:

> whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt.

When the Thompson case was decided by this Court, Article 7, Section 10 of the Louisiana Constitution of 1921 was in force. That provision was identical to the present Article 5, Section 5(C) of the Louisiana Constitution of 1974. Significantly, as the opinion in the present case declares, the "no evidence" test was regarded to be a legal standard, hence presented a legal question in a case in which there was no evidence of a particular essential element. For some unexplained, and we submit unexplainable, reason, when this Court announced the test in Jackson v. Virginia, supra, the Louisiana Supreme Court did not treat that standard as presenting a question of law but one of fact, hence an issue over

which it had no jurisdiction. We recognize that this Court is not empowered to interpret Article 5, Section 5(C) to hold that it fixes a legal standard over which the Louisiana Supreme Court has jurisdiction. That is a matter of State law which this Court must accept from the State Supreme Court. Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964). This Court, however, is obligated under Article VI, cl. 2 of the United States Constitution to enforce due process standards upon the Louisiana Supreme Court. The Jackson standard being required by due process and the Louisiana Supreme Court holding that the State Constitution bars it from according appellant the type of review required by due process, something must give. Under

Article 6, cl. 2, U.S. Const., it is the State Constitution which must always give way to the Federal Constitution's due process requirements. Therefore, Article 5, Section 5(C), Louisiana Constitution of 1974, is and must be declared to be unconstitutional.

The evidence in this case was clearly inadequate for any rational trier of fact to have concluded it to be sufficient to prove defendant's guilt beyond a reasonable doubt. Jackson v. Virginia, supra.

Appellant was accused of bribing Dorothy Boyd, a Deputy Clerk of the Criminal District Court for the Parish of Orleans, to allot cases for appellant to Section C of that Court. Dorothy Boyd and Susan Beatty furnished the only evi-

dence of the offense charged in Count I--the cash transaction. Those two witnesses, corroborated by an attorney with whom appellant had a dispute over money, furnished the only evidence on the check transaction. Their testimony, if a rational trier of fact could accept it as being true, sustained the State's burden to prove guilt beyond a reasonable doubt. But their testimony is refuted by the existing documentary evidence, hence it was irrational for the trial judge to have accepted it as being true.

Appellant produced not only his cancelled checks but the bank statements on the account his secretary testified was the account on which the alleged check was drawn. Dorothy Boyd did not know the name of the account but de-

scribed a check which was identical in appearance to the checks appellant offered in evidence. The checks were all accounted for by number. It was suggested the check might have been written out of order. The problem with such speculation, however, is that the check would still have been presented to the bank for payment and reflected on the appellant's bank statements. Even if that check had overdrawn the account and subsequently returned to the bank which cashed the check for Dorothy Boyd, as she testified, that transaction would have shown up on the bank statements. It does not. Dorothy Boyd testified that she presented the check at her bank, it was cashed by her bank and she never was notified by her bank that the check had

not been paid. Obviously, had she presented a check to the bank which was not paid, she would have been notified. If she presented a check which was paid by her bank, it would have shown up on appellant's bank statements, whether or not appellant's bank subsequently honored or returned the alleged check. Appellant introduced the statements from the date of the alleged check transaction until several months later. All checks in the amount of $200.00 were accounted for and none of them were made payable to or endorsed by Dorothy Boyd.

Clearly, the check transaction did not occur.

Since the witnesses obviously committed perjury on the check transaction alleged against the appellant, it would

be unreasonable and irrational to accept their testimony as being true on the cash transaction.

The State failed to prove the appellant's guilt, even when the evidence is viewed in the light most favorable to the Government. Such positive proof of the non-existence of the check--the absence of any bookkeeping entry on appellant's bank records--clearly requires the determination not only that the State failed to prove appellant's guilt but that he is innocent of the charges made against him.

CONCLUSION

For the foregoing reasons, the federal questions are substantial. This case presenting an issue within the Court's appellate jurisdiction, this

Court should place this matter on the Appellate Docket and grant full plenary consideration of this case.

Respectfully submitted,

F. IRVIN DYMOND
Attorney for Appellant
DYMOND, CRULL & CASTAING
1220 N. B. C. Building
New Orleans, LA 70112

Telephone: 504/581-7700

CERTIFICATE OF SERVICE

I, F. Irvin Dymond, Attorney for Appellant and a Member of the Bar of the Supreme Court of the United States, certify that a copy of the foregoing Jurisdictional Statement on Appeal to the Supreme Court of the United States has been served upon opposing counsel by United States Mail, first class postage prepaid, by depositing same in the United States Mail at a receptacle therefor provided at the First National Bank of Commerce Building, New Orleans, Louisiana 70112, the envelope bearing the following directions for delivery to opposing counsel:

Hon. William Guste
Attorney General of Louisiana
Attn: Criminal Division
Suite 700
2-3-4 Loyola Building
New Orleans, LA 70112

this 7th day of November, 1980.

All parties required to be served have been served.

F. IRVIN DYMOND
Attorney of Record for
Appellant Marcal

Supreme Court, U. S.
FILED
NOV 11 1980
MICHAEL RODAK, JR., CLERK

80-1073

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSEPH N. MARCAL, III,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

Appeal from the Supreme Court of

Louisiana

APPENDIX

APPENDIX "A"

STATE OF LOUISIANA

vs. NO. 64,318

JOSEPH N. MARCAL, III

On Appeal From the Criminal District Court, Parish of Orleans
Honorable Charles R. Ward, Judge

January 28, 1980

BLANCHE, Justice.

The defendant was convicted after a bench trial of two counts of public bribery in violation of La. R.S. 14:118. He was sentenced to one year at hard labor on each count, the sentences to run concurrently. The first count of the indictment alleged that on or about March 20, 1975, the defendant paid Mrs. Dorothy Boyd, an Orleans Parish Deputy Clerk of

Court, two hundred dollars in cash to assign one of his cases to a particular section of Criminal District Court. The second count alleged that that identical offense took place on May 16, 1975 and that the defendant gave Mrs. Boyd a check for two hundred dollars.

Mrs. Boyd testified, under a grant of immunity, that she had assigned the cases as Mr. Marcal requested and that he had paid her for these services. Her testimony was corroborated by other state witnesses. The defendant's former secretary, Mrs. Beatty, testified that on the date of the first allotment, the defendant had taken two hundred dollars from his law office. Later, she claimed he told her that he had used the money to bribe Mrs. Boyd. On May 16, 1975, the

defendant asked Mrs. Beatty to stay late to give an envelope to Mrs. Boyd. Mrs. Beatty testified that she had opened the envelope and found a two hundred dollar check payable to Mrs. Boyd on Mr. Marcal's Attorney-at-Law account. She further testified that she gave the envelope to Mrs. Boyd. Mr. Mitchell, an attorney who had rented office space from the defendant, testified that the defendant often boasted that he could have cases assigned to a particular section and that he had witnessed the May 16 transfer of the check.

The defendant argued both alibi and the lack of credibility of the witnesses. Both Mrs. Beatty and Mr. Mitchell admitted to having financial disputes with the defendant. Further, the state failed

to produce the check or any records from the banks which would verify its existence. On appeal, the defendant has urged fifteen assignments of error.

* * * * * *

Assignment of Error Number 22

The defendant contends that the trial court erred in denying his motion for a new trial, made onn the grounds that the verdict was contrary to the law and evidence.

On appeal, this Court's jurisdiction is limited to questions of law; therefore, if there is some evidence proving the essential elements of the crime, no question of law is presented, sufficiency of the evidence being a matter to be decided by the trier of fact. State v. Victor, 368 So.2d 711 (La. 1979); State

v. Madison, 345 So.2d 485 (La. 1977). It follows that on review of a denial of a motion for a new trial, this Court will not review the sufficiency of the evidence presented to the trial court but will simply determine if there is some evidence of each element. State v. Mouton, 366 So.2d 1336 (La. 1978); State v. Banks, 362 So.2d 540 (La. 1978). A review of the record reveals there was some evidence of every essential element of the crime on both counts. La. R.S. 14:-118 in pertinent part provides as follows:

> "Public bribery is the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any of the following persons, with the intent to influence his conduct in relation to his position, employment or duty: (1) Public officer or employee; or ..."

Mrs. Boyd's testimony at the trial revealed that Mrs. Boyd was a public employee and that the defendant paid her the sum of two hundred dollars on both occasions in question to alter the allotment of cases in Criminal District Court. Therefore, since there is some evidence of each and every element of the crimes charged, the assignment is without merit.

* * * * * *

For the reasons above, the conviction and sentence of the defendant are affirmed.

AFFIRMED.

SUPREME COURT OF LOUISIANA

NO. 64,318

STATE OF LOUISIANA

VERSUS

JOSEPH N. MARCAL, III

DENNIS, Justice, concurring.

When the defendant's motion for a new trial is examined on the merits, as required by the recent Supreme Court case of Jackson v. Virginia, 25 Cr.L. 3229 (decided June 28, 1979), which held that the Fourteenth Amendment's due process clause requires that a criminal conviction be based on "sufficient evidence to justify a rational trier of the facts . . . (finding) guilt beyond a reasonable

doubt," I conclude that, although the state presented a weak case, a rational trier of fact could have found guilt beyond a reasonable doubt.

APPENDIX "B"

SUPREME COURT OF LOUISIANA

No. 64318

STATE OF LOUISIANA JUNE 23, 1980

Versus

JOSEPH N. MARCAL, III

ON REHEARING

DIXON, Chief Justice

Rehearing was granted in this case to reconsider defendant's Assignment of Error No. 3 complaining of the denial of his motion to recuse the district attorney.

Defendant argues that there was such animosity on the part of the district

attorney toward the defendant, and such a "long standing vendetta," that the grounds for the recusal of the district attorney described in C.Cr.P. 680(1)1 were present. The "personal interest" and inimosity, it is argued, resulted from a prosecution of one Villarubia, a matter in which the wife of the district attorney had been interested as an attorney, having represente, as a lawyer, some of the parties involved. Mrs. Connick had testified, it is alleged, and defendant accused her of perjury, and sought her prosecution, which should have caused the district attorney to become so hostile and full of animus toward the defendant that he could not prosecute fairly and impartially.

The record does not support the

defendant's complaint, nor his argument. On the motion to recuse, only the district attorney and some assistants, and one Baumler, testified. The district attorney testified that he had known defendant for a number of years, and held no personal animosity toward him. His testimony was neither shaken nor contradicted.

The assistant district attorneys only testified to a meeting with Mr. Baumler, who was representing the defendant. At this meeting, the assistant district attorneys informed Mr. Baumler that there was an investigation into allegations of criminal conduct involving defendant and others. The assistant district attorneys inquired of Baumler whether Marcal would consider cooperating

with the prosecution in return for some limited grant of immunity.

No other evidence was offered. There is no evidence in this record to support a contention that the district attorney had such personal animosity that his personal interest conflicted with the fair and impartial administration of justice. In fact, there is no evidence in the record that Mr. Connick himself participated in any way in initiating or deciding to proceed with this prosecution against the defendant. Mr. Connick did not know about the facts of this case until after the investigation of the charges against defendant had been commenced by the district attorney's staff.

The defendant bears the burden of proving that the district attorney has a

personal interest in conflict with the fair and impartial administration of justice. State v. Snyder, 256 La. 601, 237 So.2d 392 (1970). There is no error in the trial court's ruling on the motion to recuse.

Our original opinion is reinstated, and the conviction and sentence of the defendant are affirmed.

APPENDIX "C"

IN THE SUPREME COURT OF LOUISIANA

NO. 64,318

STATE OF LOUISIANA,

Appellee,

vs.

JOSEPH N. MARCAL, III,

Appellant.

On Appeal from the Criminal District Court for the Parish of Orleans Honorable Byron Bourg, Judge ad hoc

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Joseph

N. Marcal, III, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment on rehearing reinstating the original judgment of this Court rendered on January 28, 1980, affirming the judgment of conviction, which final judgment was entered on June 23, 1980.

This appeal is taken from the portion of the judgment holding that Article 5, Section 5(C) of the Louisiana Constitution of 1974, barred review of the sufficiency of the evidence when appellant claimed that Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, reh. den., 444 U.S. , 100 S.Ct. 195, 62 L.Ed.2d 129 (1979), required that this Court review the sufficiency of the evidence under the standard "whether,

after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

This appeal is also taken from the judgment sustaining the conviction when the evidence adduced on the trial of this cause was legally insufficient to support the verdict under the constitutionally required reasonable doubt standard.

This appeal is taken pursuant to 28 U.S.C. 1257(2), since this Court has held Article 5, Section 5(C), La. Const. 1974, to be constitutional when same has been asserted by this Court to bar review of the type which is constitutionally required under Jackson v. Virginia, supra.

F. IRVIN DYMOND

DYMOND, CRULL & CASTAING
1220 N. B. C. Building
New Orleans, LA 70112
Telephone: (504) 581-7700

Attorney for Appellant

CERTIFICATE OF SERVICE

I, F. Irvin Dymond, Attorney for Appellant and a Member of the Bar of the Supreme Court of the United States, certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been served upon opposing counsel by United States Mail, first class postage prepaid, by depositing same in the United States Mail at a receptacle therefor provided at the First National Bank of Commerce Building, New Orleans, Louisiana 70112, the envelope bearing the following directions for delivery to opposing counsel:

Hon. William Guste
Attorney General of Louisiana

Attn: Criminal Division
Suite 700
2-3-4 Loyola Building
New Orleans, LA 70112

this 19th day of September, 1980.

All parties required to be served have been served.

F. IRVIN DYMOND
Attorney of Record for
Appellant Marcal

ALEXANDER L. STEVAS
CLERK

NO. 80-1073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSEPH N. MARÇAL, III,
Appellant,

versus

STATE OF LOUISIANA,
Appellee.

On Appeal from the Supreme Court of
the State of Louisiana

APPENDIX "A" AND "B" TO OPPOSITION TO MOTION TO DISMISS

F. IRVIN DYMOND
Dymond, Crull & Castaing
Counsel for Appellant
1220 NBC Building
New Orleans, LA. 70112
Telephone: 504/581-7700

APPENDIX "A"

(APPELLANT'S SUPPLEMENTAL BRIEF
AFTER ORAL ARGUMENT
Filed December 28, 1979)

IN THE SUPREME COURT OF LOUISIANA

NO. 64,318

STATE OF LOUISIANA,
Appellee,

versus

JOSEPH N. MARÇAL, III,
Appellant.

FILED
December 28, 1979

Appeal from the Criminal District Court
for the Parish of Orleans,
No. 260-889
Honorable Charles R. Ward, Judge

APPELLANT'S SUPPLEMENTAL BRIEF
AFTER ORAL ARGUMENT

This Honorable Court granted leave to the parties to file supplemental briefs following the oral arguments had on December 18, 1979. Before briefing the issues intended to be covered in

Appellant's Supplemental Brief After Oral Argument, undersigned counsel would first take this opportunity to correct a misstatement of fact made during the oral argument. It was stated, inadvertently, that appellant had not known of the journal kept by Susan Beatty which reflected all of the checks written against appellant's office account. This was a misstatement of fact. Appellant did know of that journal. When Susan Beatty left appellant's office, she kept many of the financial records and refused to deliver them to appellant's then girlfriend, his present wife, who is an accountant. It took much effort to acquire those papers from Mrs. Beatty. The financial records were finally obtained and turned over to a CPA for an audit in an effort to determine how much money Mrs. Beatty might have embezzled from appellant. When the journal

was not returned to appellant or his representatives, it was concluded that it was either destroyed or kept by Susan Beatty. To appellant, it is still unclear whether the journal had been deliberately thrown behind the file cabinets by Mrs. Beatty or others allied with her or whether it had been accidentally lost. The location of the evidence was not discovered until after the trial. The portion of this brief which discusses Assignment of Error No. 23 deals with the importance of the journal to the determination of Susan Beatty's credibility, one of the central issues in this prosecution.

THE INSUFFICIENCY OF EVIDENCE TO ESTABLISH PROOF OF GUILT BEYOND A REASONABLE DOUBT-Assignment 22

This Assignment of Error relates to the insufficiency of the evidence adduced against appellant at this trial to a judge

sitting without a jury.

Dorothy Boyd and Susan Beatty both testified that appellant made one payoff by check. Dorothy Boyd described the physical characteristics of that check. Susan Beatty, who was familiar with the various checking accounts of appellant, specifically identified the account on which the alleged check was allegedly drawn as appellant's Attorney at Law account.

On the trial of this case, appellant introduced a group of checks which had been drawn upon his Attorney at Law account at the relevant time and the bank statements which showed the activity in that account immediately before, during and after the relevant time period when the alleged check was allegedly presented to the bank for payment and would then necessarily have been reflected on appellant's bank

statement, Dorothy Boyd had described in detail the bank at which she had allegedly either deposited the alleged check or converted it to cash, the approximate date that she had done so, and she testified that the check was paid and never returned to her. Under these circumstances, the alleged check, if it had ever been written and cashed as Dorothy Boyd testified, would necessarily have appeared on Marçal's bank statement for the relevant time period. It did not! From the nature of the business of banking - they do not give away their money and then not follow up with accounting transactions reflected on the bank statements - it is obvious that the checking transaction described by Dorothy Boyd and Susan Beatty never occurred.

During oral argument of this case,

several members of the Court adverted to the "possibility" that the check had been presented for payment to the bank and that a bank officer had notified appellant and allowed him to pick up the check without an accounting transaction reflecting on the appellant's bank statement. Such a view of the agreement between appellant and the bank officer to honor overdrafts overlooks the fact, first, that the bank to which the alleged check was allegedly presented to be cashed was a branch of a different bank, and secondly, even if the bank officer had authorized payment of the check and subsequently allowed appellant to "buy it back," there still would have been bookkeeping records to reflect the receipt of the check from the other bank and cashing of the check. The bank officer would not have

personally cashed the check but would instead have authorized it to be cashed by a teller. That transaction, had it occurred, would have been reflected in bookkeeping records contemporaneously made and ultimately on the bank statement. No such transaction appears. Moreover, the bank statement was prepared many months before the allegations by Dorothy Boyd and Susan Beatty were made. There was no opportunity to manipulate these permanent records of the bank after the allegations were made. It is completely unreasonable to believe the check transaction ever occurred.

The State relies on the testimony of these two witnesses to establish the existence of the cehck and the transaction for which it was allegedly given. It seeks to preclude review by this Court

of the sufficiency of the evidence under a line of cases which follows Thompson v. Louisville, 362 U.S. 199 (1960), and applies the "no evidence" test. Under those cases, if there is some evidence of every essential element of the offense, no matter how incredible the testimony might be, the Federal Constitution would not require the Louisiana Supreme Court to review the sufficiency of the evidence and, as a matter then of State constitutional law, Art. 5, Sec. 5 of the Louisiana Constitution of 1974 would prohibit such factual review in a criminal case. If there is no evidence of one or more essential elements of the offense, the cases cited by the State hold that the sufficiency of the evidence to establish guilt is a question of law which the Court may review without transgressing Art. 5, Sec. 5 of the

Louisiana Constitution.

Since the State filed its brief in this case, the U.S. Supreme Court has decided that the Thompson "no evidence' test is constitutionally inadequate to implement and satisfy the constitutional standard that the State is required to prove guilt beyond a reasonable doubt. In Jackson v. Virginia, 443 U.S.____, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the U.S. Supreme Court held that the sufficiency of the evidence in a State criminal case must be assessed under the standard (99 S.Ct. at 2789):

> whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Stated another way, the Court stated that if reasonable jurors must necessarily have

had a reasonable doubt as to guilt, acquital is required as the only permissible result under Federal constitutional guarantees. 99 S.Ct. at 2789 n. 11.

While the Jackson case delt with a verdict reached by a jury, rather than by a judge sitting without a jury, the principles established by that case apply equally to trials to judges as those to juries. The pinion case upon which the Court relied in Jackson was In re Winship, 397 U.S. 358 (1970). That was a juvenile case in which there was no jury. Jackson was written in a manner to apply to either judge or jury trials because the Court prescribed the standard to be whether "any rational trier of fact," rather than any rational juror, could have found the essential elements of the crime beyond a reasonable doubt.

During the oral argument of this case, it was pointed out that Jackson was a federal habeas corpus case, not a case which reached the Court upon direct review. The Court inquired whether the Jackson case fixed standards for State Court judges' review of the evidence or whether its holding regulated only federal habeas corpus proceedings. That inquiry, we believe, was prompted by the following excerpt from Jackson (99 S.Ct. at 2788):

> Although several of our cases have intimated that the fact-finder's application of the reasonable doubt standard to the evidence may present a federal question when a state conviction is challenged,***, the federal courts of appeals have generally assumed that so long as the reasonable doubt instruction has been given at trial, the no-evidence doctrine of Thompson v. Louisville remains the appropriate guide for a federal habeas corpus court to apply in assessing a state prisoner's challenge to

> his conviction as founded upon insufficient evidence.***

That statement was not intended to limit the application of Jackson to federal habeas corpus proceedings. The Court was merely pointing out that the insufficiency of the evidence, rather than the absence of evidence on any essential element, presented a federal question which was cognizable upon federal habeas corpus proceedings. Federal habeas corpus is available to a state prisoner only in a limited category of cases. These categories are set forth in 28 U.S.C., Sec. 2241(c)(2-4):

> The writ of habeas corpus shall not extend to a prisoner unless-
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein as in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depends upon the law of nations; or
>
> * * * * * *

The above quoted excerpt from the Jackson case merely addresses the threshold jurisdictional question in the type of case then before the Court. It was squarely determined, however, that the insufficiency of the evidence to establish proof beyond a reasonable doubt raised a constitutional issue, not a mere federal issue exclusively within the province of federal habeas corpus proceedings. 99 S.Ct. at

2790. As a constitutional issue. this Court is constitutionally bound to follow and apply the Jackson holding, just as it has previously followed and applied the erroneous no-evidence test of Thompson v. Louisville, which Jackson overrulled. Accord, Art. VI, Sec. 6, U.S. Constitution (Supremacy Clause).

The Jackson case has been held to apply retroactively, so there is no problem with the applicability of that decision to this case. Pilon v. Bordenkircher, __ U.S. __, 100 S.Ct. 7, 8 (1979) (Per Curiam); Blake v. Thompson, ___ U.S. ___, 100 S.Ct. 27 (1979) (2d memo order).

The Jackson case does not empower or authorize the Judges of this Court to substitute their own subjective judgments of the sufficiency of the evidence for that of the fact finder in the trial court. The Court said in this regard (99 S.Ct.

at 2789-90):

> After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt."*** Instead the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.***This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus

> impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law. (Emphasis in original; footnotes omitted.)

There was no question in the Trial Court of the genuineness of the bank statements received in evidence by the Court. Viewing the evidence in the light most favorable to the State, we have testimonial evidence of the existence of a particular check drawn upon a particular account contrasted with documentary evidence, business records of an entity over which the defendant could exercise no control, which shows that no such check was ever negotiated. The alleged recipient of the alleged check, however, testified that the check was indeed negotiated and described the bank and her activities in connection with the negotiation of the alleged check.

Under these circumstances, it is impossible reasonably to conclude that the testimonial evidence was truthful when the documentary evidence which would necessarily exist in support of the transaction conclusively shows that no such transaction occurred.

But even assuming that the testimonial weight in support of the existence of the check was equally as weighty as the documentary evidence which disproved its existence, in order to find appellant guilty upon such equally weighted evidence would require the application of a "preponderance of the evidence" standard of proof, rather than the constitutionally required standard of "proof beyond a reasonable doubt." That is constitutionally impermissible under the explicit holding of In re Winship, supra, at 364

in which the Court said:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

The testimony adduced with regard to the cash transaction came from the same sources as the testimony relative to the check transaction. Naturally, no one can produce countervailing documentary proof of the non-existence of a cash transaction, as he could do with regard to a check transaction, in order to refute the testimony of witnesses with regard to alleged cash payoffs attributed to him. We believe, however, that once it is demonstrated that it was unreasonable for any

rathional trier of fact to have reasonably concluded beyond a reasonable doubt that the transaction regarding the check actually occurred, the "legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution" (99 S.Ct. at 2789) is no longer viable to save the cash transaction from judicial scrutiny to determine whether it was reasonable to believe that any rational trier of fact could have reasonable concluded that the witnesses' testimony regarding the cash transaction was credible notwithstanding their proven incredibility with regard to the check transaction. It is obvious that the factfinder did not apply the constitutionally required standard of proof beyond a reasonable doubt when it reached the conclusion with regard to the check transaction that the check existed and the

bribery with that check actually occurred. It would be arbitrary and wholly inconsistent with human experience to believe that any different standard of proof and any greater basis for evaluating the witnesses' credibility existed with regard to the cash transaction than with regard to the cehck transaction. Therefore, there is no rational basis for applying the "legal conclusion" with regard to the cash count of the indictment to preserve it from judicial review.

A "legal conclusion" is something less than a "legal presumption." Were the "legal conclusion" referred to in the Jackson case to enjoy the same dignity as a "legal presumption," the Courts should not apply it to this case under the circumstances.

It is well-established in the federal

constitutional jurisprudence regarding "conclusive presumptions" that a "presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.***(W)here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." Leary v.U.S., 395 U.S. 6, 33-34 (1969), quoting Tot v. U.S., 319 U.S. 463, 467-468 (1948). Since the applicability of the presumption of regularity of the verdict cannot survive the constitutionally required scrutiny with regard to the check count, the inference

that the factfinder applied the proper standard of proof with regard to the alleged cash transaction would place a strain upon the "legal conslusion" of regularity well beyond the tensile strength of the due process clause's permissible limits. The verdict in one count cannot be presumed to be regular when, in this particular case, it is shown that the verdict on the other count is necessarily rendered in disregard to the proper constitutional standards and the same witnesses' credibility is the sole criterion upon which any reasonable judgment could have been based.

In the Leary case, the Court dealt with a statutory presumption based upon a finding of fact by Congress several years prior to that petitioner's conduct. While not disputing the validity of Congress'

finding at the time it declared that knowledge of importation could be presumed from the fact of possession, the U.S. Supreme Court held that a statutory presumption based on such findings is subject to constitutional attack when the facts on which the statutory presumption was based no longer exist to warrant the legal presumption. The Court held that in ruling upon a constitutional challenge to the constitutionality of the statutory presumption based on its arbitrariness because based on antiquated factual conclusions the courts must be free to reexamine the factual declaration. 395 U.S. at 52-53. The Court must be free to reexamine the "legal conclusion" that the verdict on the cash transaction was lawfully obtained when it is shown conclusively, as here, that the wrong

constitutional standard of proof was applied to the evidence on another count of the indictment and the factfinder and the source of that evidence is the same with regard to both counts.

The Court has recently applied the standard of the Jackson case in State v. Poree, No. 64,308 of the Docket of the Supreme Court of Louisiana (decided November 1, 1979), rehearing granted (December 13, 1979), in which it held the assertion of the issue of the legal insufficiency of the evidence to support proof of guilt beyond a reasonable doubt was proper in a motion for a new trial in which the defendant asserted that the verdict was contrary to the law and evidence. That issue was not disputed by the State in its Petition for Rehearing or in the motion by the appellant for clarification of the

proceedings to be had following remand of the case to the Trial Court. The motion in the instant case, asserting that the verdict was contrary to the law and evidence, was the proper procedural vehicle to bring this issue before this Court.

In Burks v. U.S., ___ U.S. ___, 98 S.Ct. 2141 (1978), the Supreme Court of the U.S. held that entry of a judgment of acquittal is mandated after an appellate determination that the evidence was legally insufficient to establish guilt beyond a reasonable doubt. Since the evidence in this case is legally insufficient to satisfy the constitutional standard of proof beyond a reasonable doubt, this Court should reverse the judgment on both counts and remand this case for entry of a judgment of acquittal.

NEWLY DISCOVERED EVIDENCE
Assignment No. 23

The principal evidence offered on the motion for a new trial on the ground that it was "newly discovered" was a journal written in the hand of Susan Beatty accounting for all of the checks written during the relevant period, which did not reflect the alleged $200 check; evidence that Dorothy Boyd did not negotiate a check at the Gentilly Branch of the Bank of New Orleans when she said she did; and a mass of evidence which showed that all of the appellant's checking accounts were at the Hibernia National Bank and all of the checks and statements from those accounts during the relevant period. It is significant that Susan Beatty never testified that she was told not to account for the $200 check in the journal nor why she, supposedly having knowledge of the check, never accounted for it in the journal.

Even though the journal was not produced and she was not questioned about her omission of that check from its pages, she did testify about the procedures used in accounting for those checks and if she had been told not to reflect the check in the journal, she certainly would have testified about that. Since she did not, it is reasonable to believe that she was not told not to record the check in the journal. That gives particular significance to the omission of that check from the journal which was not before the Trial Court when it was considering the issue of the existence of the check.

The State, in its brief, expresses doubt that the newly discovered evidence could pass the "reasonable diligence" test. Appellant's testimony reflects that the journal had fallen behind a file cabinet in his office and was not

available for production at the trial because it was not discovered there until after the trial. It is unreasonable to conclude that this evidence would not have been produced at the trial if it had been available at the time of trial. Appellant's wife testified and produced an exhibit she had prepared which accounted for all of the checks drawn upon appellant's Attorney at Law account for the time preceding, during and following the relevant time period. There would have been no strategic advantage in presenting this inferior evidence had the document reflecting the same information, but written in Susan Beatty's own hand, been available. It was crucial to this case to refute Susan Beatty's testimony. How could that have been done better than by rpoducing a journal written in her own

hand which cast doubt upon the fact that she knew of the existence of the check while she failed to account for it or to explain why she had not done so?

With regard to the newly obtained evidence regarding proof that no such check was deposited or cashed on the day Dorothy Boyd testified she negotiated it at the BNO Branch in the Gentilly Schwegmann's store, that evidence did not come out until the time of trial. There was no way counsel of the defendant could have anticipated that testimony. The prosecution and its witnesses were hostile to the defendant and not cooperative in his effort to prepare his defense. As reflected by a letter from BNO, it would have taken several hundred man hours to examine the tapes of the various tellers to check out the negative or affirmative existence of

the transaction about which Dorothy Boyd testified. It cannot be gainsaid that, upon such short notice, it was practically if not virtually impossible to have obtained that evidence during the trial of this case when the necessity for such evidence did not become known until during the trial.

The last group of evidence submitted on the motion for a new trial based on "newly discovered evidence" was (1) a packet of letters from the bankers in this area reflecting that appellant did not have any checking accounts, either in his own name or on which he had power to write checks, in any bank other than the Hibernia National Bank and (2) a letter describing the accounts in the Hibernia National Bank owned by Marçal or which he had power to sign checks against. At the

hearing on the motion for a new trial, appellant presented the checks from the other accounts for the period immediately preceding, during and succeeding the time when Dorothy Boyd and Beatty testified Marçal wrote the $200 check, had Beatty given it to Boyd and Boyd negotiated it. Since Boyd particularly described the check she allegedly received by size, color and signature and Beatty testified that the check was drawn against appellant's Attorney at Law account (the only account in which appellant's checks fit the description given by Boyd), there was no apparent need for the checks and statements of other accounts to be presented in evidence. The necessity to present this evidence was occasioned by an off-the record statement made by Judge Baron Bourg to appellant's former counsel, Pat

O'Brien, that there must have been a check drawn on some account of Marçal's and given to Dorothy Boyd because of the number of witnesses testifying to the transaction and their apparent credibility (supported by their number?).

On the record as it existed before the motion for a new trial, the State's case could only be regarded to establish the existence of the check by a preponderance of the evidence at best, not by proof of beyond a reasonable doubt as constitutionally required. The evidence which has been discovered or obtained in the interval since the verdict is of such a substantial nature that it cannot be doubted that it reasonably would have required a different verdict had it been presented during the trial of this matter. All due diligence was exercised in the

acquisition and presentation of evidence in this case. It would have required extraordinary diligence to have found the lost journal and to have anticipated the Trial Judge would not have accepted the description of the check given by the alleged recipient and appellant's secretary which positively identified the account out of which the alleged check transaction had occurred. Therefore, the motion for a new trial should have been granted.

FAILURE TO OBJECT TO THE COURT'S RULING AGAINST THE DEFENDANT WHICH WAS MADE IN RESPONSE TO THE STATE'S OBJECTIONS TO DEFENDANT'S CROSS-EXAMINATION OF THE STATE'S WITNESSES-Assignments Nos. 6,7 and 11

The State's defense to the errors assigned in Assignments of Error Nos. 6, 7 and 11 is that defendant did not object to the rulings of the Court which were

made in response to the prosecutor's objections to cross-examination by the defense. As authority for the application in the situation here of Art. 841, La.C. Cr.P., the State cites State v. Western, 355 So.2d 1314 (La.1978), and State v. Matthews, 354 So.2d 552 (La.1978). Those cases are easily distinguishable from the instant case. In Matthews, the defendant withheld his motion for a mistrial grounded upon alleged error which occurred during the prosecutor's opening statement until after the State closed its evidence in chief. 354 So. 2d at 1320. It was an objection by the defense, not the State, and the defense attorney gave no reason whatever for his objection, the nature of which was not apparent. The Court held:

> An assignment of error based upon an objection without an

> identified basis presents nothing for our review.

The instant case is distinguishable from the Matthews case and every case cited therein because the rulings to which objections were there made on appeal had not been objected to by either party at the time the alleged error occurred. Art. 841, La. C.Cr.P., provides:

> An irregularity of error cannot be availed of after verdict unless it was objected to at the time of its occurrence.***It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.

What the State has overlooked in citing Art. 341, La.C.Cr.P. and the line of cases cited in Matthews is that there was an objection in each of the three instances countenanced in these assignments: THE

STATE'S! At the time the ruling was sought by the State, it was obvious that the defense wanted the Court to overrule the State's objection and permit the inquiry on cross-examination.

The purpose of requiring a contemporaneous objection is to give the Trial Court the opportunity to correct an error made in the proceedings, rather than sandbagging the proceedings by holding back until the appellate proceedings to urge the error. When the State makes an objection, the Court is given the opportunity to study the action taken by it before ruling to the prejudice of the defendant. There is no formalistic requirement for a party who loses his opponent's objection to note an objection to the Court's ruling thereon. Were that the case, there would have been no reason to change

the bill of exceptions procedure under Louisiana law to the procedure provided in Rule 51, F.R.Cr.P.

CONCLUSION

For the foregoing reasons, as well as those stated in Appellant's Original Brief, the judgment below should be reversed. Because of the insufficiency of the evidence to establish proof of guilt beyond a reasonable doubt, this Court should order the entry of a judgment of acquittal upon remand of this case to the Trial Court. In the alternative only, and preserving all rights to further review of the insufficiency issue pending any retrial of this matter, this Court should vacate the verdict and judgment in this case and remand this matter

to the Court below for a new trial in accordnace with constitutional principles.

Respectfully submitted,

F. IRVIN DYMOND
Attorney for Joseph N. Marçal, III
1220 FNBC Building
New Orleans, LA. 70112
Telephone: 504/581-7700

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served on Patrick Fanning, Assistant United States Attorney and cousel pro hac vice for appellee, 500 Camp Street, New Orleans, La, this 28th day of December, 1979.

F. IRVIN DYMOND

APPENDIX "B"

(EXTRACT OF DOCKET BOOK -
Entries of December 18, 1979
and December 28, 1979)

UNITED STATE OF AMERICA

STATE OF LOUISIANA

SUPREME COURT
OF THE
STATE OF LOUISIANA

New Orleans, 70112

EXTRACT OF DOCKET BOOK

64,318 State of Louisiana vs. Joseph N. Marçel, III

ENTRIES

12/18/79 Called, argued and submitted.

12/28/79 Filing supplemental brief by Appellant as ordered by the Court.

I Dan B. Haggerty, Jr., Deputy Clerk, Supreme Court of Louisiana, do hereby certify the above to be a true and correct extract of the Docket Book of this Court.

IN WITNESS WHEREOF, I hereunto sign my

name and affix the seal of the Court aforesaid, at the City of New Orleans this 16th day of April, A.D., 1980.

_____
Deputy Clerk, Supreme Court
of Louisiana

No. 80-1073

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH N. MARCAL, III,
Appellant,

versus

STATE OF LOUISIANA,
Appellee.

On Appeal from the Supreme Court of
The State of Louisiana

MOTION TO DISMISS

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL FOR
THE STATE OF LOUISIANA

BARBARA RUTLEDGE
ASSISTANT ATTORNEY GENERAL
FOR THE STATE OF LOUISIANA

HARRY F. CONNICK
DISTRICT ATTORNEY FOR
THE PARISH OF ORLEANS

J. KEVIN McNARY
ASSISTANT DISTRICT ATTORNEY
FOR THE PARISH OF ORLEANS,
COUNSEL OF RECORD FOR
THE STATE OF LOUISIANA

619 South White Street
New Orleans, Louisiana 70119
Telephone: (504) 822-2414, Ext. 606

SCOFIELDS' QUALITY PRINTERS P. O. BOX 53096 N. O., LA. 70153 - 504/822-1811

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED i

STATEMENT OF THE CASE 1

ARGUMENT 3

CONCLUSION 7

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES CITED

CASES:

JACKSON v. VIRGINIA, 443 U.S. 307 (1979) 4,7

STATE v. ROY, La.S.Ct. No. 80-KA-1513 (Jan. 26, 1981) 5

CONSTITUTIONAL AND STATUTORY PROVISIONS:

UNITED STATES CODE:

28 U.S.C. 1257(2) 3-4,5

LOUISIANA CONSTITUTION OF 1974:

Art. 5, Sec. 5(C), La. Const 1974 4,5

No. 80-1073

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

JOSEPH N. MARCAL, III,
Appellant,

versus

STATE OF LOUISIANA,
Appellee.

On Appeal from the Supreme Court of
The State of Louisiana

MOTION TO DISMISS

STATEMENT OF THE CASE

The appellant was convicted after a bench trial of two counts of public bribery in violation of La.R.S. 14:118. He was sentenced to one year at hard labor on each count, the sentences to run concurrently. The first count of the indictment alleged that on or about March 20, 1975, the defendant paid Mrs. Dorothy Boyd, an

Orleans Parish Deputy Clerk of Court, two hundred dollars in cash to assign one of his cases to a particular section of Criminal District Court. The second count alleged that that identical offense took place on May 16, 1975, and that the defendant gave Mrs. Boyd a check for two hundred dollars.

Mrs. Boyd testified, under a grant of immunity, that she had assigned the cases as Mr. Marcal requested and that he had paid her for these services. Her testimony was corroborated by other state witnesses. The defendant's former secretary, Mrs. Beatty, testified that on the day of the first allotment, the defendant had taken two hundred dollars from his law office. Later, she claimed he told her that he had used the money to bribe Mrs. Boyd. On May 16, 1975, the defendant asked Mrs. Beatty to stay late to give an envelope to Mrs. Boyd. Mrs. Beatty testified that she had opened the envelope and found a two hundred dollar check payable to Mrs. Boyd on Mr. Marcal's Attorney-at-Law account. She further testified that she gave the envelope to Mrs. Boyd. Mr. Mitchell, an attorney who had rented office space from the defendant, testified that the defendant often boasted that he could have cases assigned to a particular section and that he had witnessed the May 16 transfer of the check.

The appellant argued both alibi and the lack of credibility of the witnesses. Both Mrs. Beatty and Mr. Mitchell admitted to having financial disputes with the

defendant. Defendant also made much of the inability of the state to produce the check or any records from the banks which would verify its existence.

Marcal appealed his conviction to the Supreme Court of Louisiana, which Court affirmed in a decision rendered on January 28, 1980. (See Appellant's Appendix A, pp. 1-8) The Supreme Court of Louisiana thereafter granted rehearing of the appeal on limited grounds, and, on June 23, 1980, again affirmed appellant's conviction and reinstated its original opinion. (See Appellant's Appendix B, pp. 9-13)

ARGUMENT

The State of Louisiana respectfully avers that this case is not properly before this Honorable Court on appeal, and prays that it be dismissed on the following grounds, as more fully set out below:

(a) The appeal is not within this Court's jurisdiction.

(b) The appeal does not present a substantial federal question.

(c) The federal question sought to be reviewed was neither properly raised nor expressly passed on.

Appellant attempts to invoke the appellate jurisdiction of this Court under the provisions of 28 U.S.C.

§1257(2). He alleges that Article 5, Section 5(C) of the Louisiana Constitution of 1974, as interpreted by the Supreme Court of Louisiana, is unconstitutional in light of this Court's holding in *Jackson v. Virginia*, 443 U.S. 307 (1979).

It should be noted at the outset, that in the original majority opinion rendered by the Supreme Court of Louisiana on appellant's case there is made no express mention of either Article 5, Section 5(C) of the State Constitution or the effect of the *Jackson* decision thereupon. Nor was review under the *Jackson* standard urged upon that Court by appellant in his original brief. Marcal relied upon *Jackson* for the first time in his Petition for Rehearing, obviously inspired by Justice Dennis' concurring opinion in the original decision in which he proposes *Jackson* as the appropriate standard of review and concludes that in this case a rational trier of fact could have found guilt beyond a reasonable doubt. (See Appellant's Appendix A at 8-9).

On rehearing, the Supreme Court of Louisiana again affirmed Marcal's conviction. The opinion on rehearing does not mention the *Jackson* issue (although belatedly urged by appellant in his Petition for Rehearing) because the rehearing was limited to the question of the alleged bias of the district attorney. (See Appellant's Appendix "B" at 9.) Since Marcal raised the *Jackson* issue for the first time in a limited rehearing granted to consider a totally different issue, it is apparent, as alleged in (c), supra, that the federal question

sought to be reviewed in this case was neither properly raised before the Supreme Court of Louisiana, nor expressly passed on by that Court. This appeal should, therefore, be dismissed.

Furthermore, this Court should be aware that, contrary to appellant's basic contention in his jurisdictional statement, the Supreme Court of Louisiana has not interpreted Article 5, Section 5(C), Louisiana Constitution of 1974, to bar review of the type mandated by this Court in *Jackson*. Rather, as recently stated by the Supreme Court of Louisiana in *State v. Roy*, No. 80-KA-1513 (Jan. 26, 1981):

> . . . this court has now adopted the *Jackson* standard of review when evaluating allegations by defendants that the state presented insufficient evidence to prove an essential element of the crime charged beyond a reasonable doubt. *Roy, supra,* at 4.

Since the Supreme Court of Louisiana has fully embraced the *Jackson* standard of review, and has not interpreted Art. 5, La. Const. of 1974 in such a way as to bar such review, then appellant's invocation of this Court's jurisdiction under 28 U.S.C. §1257(2) is clearly without basis, constituting further reason why this appeal should be dismissed.

Additionally, as alleged in (b) above, this appeal should be dismissed for failure to present a substantial

federal question. When reviewed under the *Jackson* standard, the evidence in this case is clearly such that a reasonable trier of fact could easily have found beyond a reasonable doubt that Marcal committed public bribery on March 20, 1975, by paying Dorothy Boyd, a deputy clerk of Criminal District Court for the Parish of Orleans, $200.00 in cash to assign one of his cases to Section "C" of that Court; and, further, that he committed public bribery on May 16, 1975, by giving Dorothy Boyd a $200.00 check to cause another of his cases to be allotted to Section "C".

Not only did Dorothy Boyd testify fully at trial regarding her part in these two acts of public bribery, but Susan Beatty, Marcal's secretary in 1975, testified that Marcal had indeed paid Dorothy Boyd $200.00 on each occasion to fix the allotment, and Henry Mitchell, an attorney sharing space with Marcal, testified that Marcal had told him that he, Marcal, knew how to get cases allotted to certain sections of court by paying $200.00.

As he did in his argument to the trial judge, and in his brief and argument to the Supreme Court of Louisiana, Marcal now dwells on the fact that the cancelled check from the May 16, 1975, transaction was never found. Such negative evidence can not prevail against the credible testimony of Boyd, Beatty, and Mitchell since there are any number of possible explanations for the disappearance of such documents. Further, such "evidence" in no way affects the validity of appellant's con-

viction on the March 20, 1975 count, which was a cash transaction.

In any event, the trial judge heard all the witnesses and the identical defense arguments and resolved the conflicts therein against Marcal, as did the Supreme Court of Louisiana on two occasions. Under *Jackson v. Virginia, supra,* these findings are presumed to be correct. Appellant, therefore, presents no substantial federal question to this Court for adjudication.

In light of the above, the State of Louisiana respectfully submits that this appeal should be dismissed. Since the Supreme Court of Louisiana has adopted the *Jackson* standard, this case is clearly not appropriate for plenary review by this Honorable Court. The State would therefore urge, in the alternative, that if this Court should decide not to dismiss this appeal summarily, then it should, in the interest of comity, remand the case to the Supreme Court of Louisiana for that Court to make explicit its assessment of the sufficiency of the evidence in this case under the standard enunciated in *Jackson v. Virginia, supra.*

CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to dismiss this appeal, to deny the application for certiorari, and to affirm the judgment of the Supreme Court of Louisiana, or, in the alternative, to

remand the case for further findings as indicated above.

Respectfully submitted,

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL FOR
THE STATE OF LOUISIANA

BARBARA RUTLEDGE
ASSISTANT ATTORNEY
GENERAL FOR THE
STATE OF LOUISIANA

HARRY F. CONNICK
DISTRICT ATTORNEY FOR
THE PARISH OF ORLEANS

J. KEVIN McNARY
ASSISTANT DISTRICT
ATTORNEY FOR THE
PARISH OF ORLEANS,
COUNSEL OF RECORD FOR
THE STATE OF LOUISIANA

J. KEVIN McNARY

CERTIFICATE OF SERVICE

I, J. Kevin McNary, Attorney for Appellee, certify that a copy of the foregoing Motion to Dismiss the Appeal has been served upon opposing counsel by United States Mail, first class postage prepaid, by depositing same in the United States Mail at a receptable therefor provided at 619 South White Street, New Orleans, Louisiana 70119, the envelope bearing the following directions for delivery to opposing counsel:

F. Irvin Dymond
Dymond, Crull and Castaing
1220 N.B.C. Building
New Orleans, Louisiana 70112

This ____ day of April, 1981.

All parties required to be served have been served.

J. KEVIN McNARY
Attorney of Record for Appellee
State of Louisiana

NO. 80-1073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSEPH N. MARÇAL, III,
Appellant,

versus

STATE OF LOUISIANA,
Appellee.

On Appeal from the Supreme Court of
The State of Louisiana

OPPOSITION TO MOTION TO DISMISS

F. IRVIN DYMOND
Dymond, Crull & Castaing
Counsel for Appellant
1220 NBC Building
New Orleans, LA. 70112
Telephone: 504/581-7700

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES CITED..... i

STATEMENT OF THE
OPPOSITION AND ARGUMENT..... 1

CONCLUSION.....11

CERTIFICATE OF SERVICE.....12

TABLE OF AUTHORITIES CITED

CASES:

JACKSON v. VIRGINIA,
443 U.S. 307, 99 S.Ct.
2781 (1979).....3,4,5,6,7,8

STATE v. ROY,
La.S.Ct. No. 80-KA-1513
(Jan. 26, 1981).....7,8

CONSTITUTIONAL AND
STATUTORY PROVISIONS:

LOUISIANA CONSTITUTION OF 1974:
Art.5, Sec. 5(C),
La. Const. 1974.....3,6,8

NO. 80-1073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSEPH N. MARÇAL, III,
Appellant,

versus

STATE OF LOUISIANA,
Appellee.

On Appeal from the Supreme Court of
The State of Louisiana

OPPOSITION TO MOTION TO DISMISS

STATEMENT OF THE OPPOSITION AND ARGUMENT

The basis for the State of Louisiana's Motion To Dismiss rests upon two false assumptions. One false assumption, as noted at page 4 of the State's Motion To Dismiss is "...that in the original majority opinion rendered by the Supreme

Court of Louisiana on appellant's case there is made no express mention of either Article 5, Section 5(C) of the State Constitution or the effect of the Jackson decision thereupon." The other pivotal false assumption follows in the next sentence at page 4 of the State's Motion, where it is noted additionally, "Nor was review under Jackson standard urged upon that Court by appellant in his original brief."

The foregoing false assumptions are pivotal to the State's position. The State reasons from these two falsities that, because appellant made "...no express mention of either Article 5, Section 5(C) of the State Constitution or the effect of the Jackson decision thereupon...", and that appellant "...raised the Jackson issue for the first time in a limited

rehearing granted to consider a totally different issue,...", the "...federal question sought to be reviewed in this case was neither properly raised before the Supreme Court of Louisiana nor expressly passed on by that Court. This appeal should, therefore, be dismissed." (See Motion To Dismiss at 4-5)

Not only did the Louisiana Supreme Court, in regards to appellant's case then before it, expressly declare that it was following the mandate of Article 5, Section 5(C) of the Louisiana Constitution of 1974, in declaring that its "...jurisdiction is limited to questions of law;...", (See Appellant's Appendix "A" at A-4), but the Louisiana Supreme Court itself ordered both appellant and the State of Louisiana to submit supplemental briefs on Jackson v. Virginia, 443

U.S. 307, 99 Sup.Ct. 2781 (1979), as it applied to the above State of Louisiana constitutional provision and appellant's case. Oral argument before the Louisiana Supreme Court was had on December 18, 1979, and each party was given until December 28, 1979, to submit supplemental briefs. On December 28, 1979, appellant timely submitted his supplemental brief, the State of Louisiana choosing not to submit anything. (See Opposition Appendix "A" at 1-38 for Appellant's Supplemental Brief After Oral Argument; and see Opposition Appendix "B" at 1 for Extract Of Docket Book of Louisiana Supreme Court)

This Court's attention is directed to Appellant's Supplemental Brief After Oral Argument at 1-38 of Opposition Appendix "A". Please note that it was filed timely on December 28, 1979, as per orders of the Louisiana Supreme Court as reflected

in the Extract Of Docket Book of said Court which is found herein at 1 of Opposition Appendix "B". Also, please note that the supplemental brief of appellant before the Louisiana Supreme Court was filed before that Court exactly one (1) month prior to the day of the original majority opinion of same Court. (See Appellant's Appendix "A" at A-1 for date of opinion) Further, the Court should note that Appellant's Supplemental Brief After Oral Argument deals almost exclusively with the Jackson decision and its effect on the Louisiana Constitution of 1974 and appellant's case.

Appellant's Supplemental Brief After Oral Argument timely filed one (1) month before the Louisiana Supreme Court's majority opinion, properly and expressly raised the issue of the Jackson standard

as it applied to the Louisiana Constitution and appellant's case.

The language of the Louisiana Supreme Court's majority opinion shows that it clearly and unequivocally refused to apply the Jackson standard, and, instead, applied Article 5, Section 5(C) of the Louisiana Constitution of 1974, as appears in the majority opinion at Appellant's Appendix "A" at A-4, as follows:

> "On appeal, this Court's jurisdiction is limited to questions of law; therefore, if there is some evidence proving the essential elements of the crime, no question of law is presented, sufficiency of the evidence being a matter to be decided by the trier of fact... (Citations omitted)..."

It was not appellant who was inspired by Justice Dennis as suggested by the State of Louisiana in its Motion To Dismiss at 4. Instead, it was Justice

Dennis who was inspired by appellant's efforts to confront the Louisiana Supreme Court with the Jackson standard.

Once the Louisiana Supreme Court refused to adopt the Jackson standard and apply it to appellant's appeal, subsequent adoption by same Court of the Jackson standard and application of same to criminal appeals in other completely unrelated cases does not somehow correct the denial to appellant of those "...elemental due process..." rights to which he was then and is now entitled. As suggested by the State of Louisiana, appellant concedes that by State v. Roy, La.S.Ct. No. 80-KA-1513 (Jan. 26, 1981), the Louisiana Supreme Court now applies the Jackson standard. However, when it was crucial to appellant, almost one (1) year to the date before State v. Roy, supra., the

Louisiana Supreme Court clearly refused to apply the then six (6) month old Jackson decision to its appellate review of appellant's case. The issue before this Court is whether or not the Louisiana Supreme Court, when timely presented with the issue of the unconstitutionality of Article 5, Section 5(C) of the Louisiana Constitution of 1974, in light of the Jackson standard, applied said standard. By its own language in its majority opinion of January 28, 1980, the Louisiana Supreme Court did not apply the Jackson standard to appellant's appeal before it. Instead, it limited its consideration to "...questions of law..." as noted herein previously.

The State has presented in its Motion To Dismiss certain allegations as to the evidence presented in the judge-trial of

appellant which resulted in his initial conviction. Without the four (4) volume typewritten record of the trial which exceeds one thousand (1,000) pages, this Court cannot judge the merits of such evidence. Because of the State of Louisiana's mentioning of same evidence, appellant would show that these allegations made by the State of Louisiana do not, in any way, present this Court with a correct or clear picture of the evidence. The evidence shows that appellant proved his innocence. Being "...limited to questions of law...", the Louisiana Supreme Court individually or as a group of any number, did not read this one thousand (1,000) page typewritten transcript and accompanying numerous defense exhibits. Appellant credibly accounted for his presence at the time he was

supposed to have given a cash bribe. Appellant's testimony was strongly supported by businesswoman, Jo Lewis. Appellant proved, to a certainty, by his own and bank records, that the transaction parroted by the State of Louisiana's witnesses could not and did not occur. The motives of the witnesses for the State of Louisiana were also clearly proven by appellant, none of which added credit to the scenario presented by the State of Louisiana. Evidence of prosecutorial misconduct and indiscretions on the part of the trial judge need not be gone into at this point. Suffice it to note that there is much more to this than the State of Louisiana's representations would have this Court understand.

CONCLUSION

Appellant requests that this United States Supreme Court deny the Motion To Dismiss filed by the State of Louisiana through the offices of the District Attorney for the Parish of Orleans and place this matter on the appellate docket and grant full plenary consideration of this case.

RESPECTFULLY SUBMITTED:

F. IRVIN DYMOND
Dymond, Crull, & Castaing
Attorney for Appellant
1220 NBC Building
New Orleans, LA. 70112
Telephone: 504/581-7700

CERTIFICATE OF SERVICE

I, F. Irvin Dymond, Attorney for Appellant, certify that a copy of the foregoing Opposition To Motion To Dismiss has been served upon opposing counsel by the United States Mail, First Class Postage prepaid, by depositing same in the United States mail at a receptacle therefor provided at the main post office for the City of New Orleans, Louisiana, the envelope bearing the following directions for delivery to opposing counsel:

Hon. William Guste
Attorney General of Louisiana
Attention: Criminal Division
Suite 700, 234 Loyola Building
New Orleans, Louisiana 70112

J. Kevin McNary
Assistant District Attorney
for the Parish of Orleans
619 South White Street
New Orleans, Louisiana 70119

This ___ day of April, 1981.

All parties required to be served have been serve.

F. IRVIN DYMOND
Dymond, Crull & Castaing
Attorney for Appellant
1220 NBC Building
New Orleans, LA. 70112
Telephone: 504/581-7700